

IN THE UNITED STATES ARMY
FIRST JUDICIAL CIRCUIT

UNITED STATES)

v.)

MANNING, Bradley E., PFC)
U.S. Army, (b) (6))
Headquarters and Headquarters Company,)
U.S. Army Garrison, Joint Base Myer-)
Henderson Hall, Fort Myer, VA 22211)

**RULING: DEFENSE MOTION
TO COMPEL DISCOVERY -
DAMAGE ASSESSMENTS – DOS,
DIA IRTF, CIA.**

DATED: 6 June 2012

On 23 March 2012, the Court ordered the Government by 18 May 2012 to disclose damage assessments by the DIA Information Review Task Force (IRTF), the Department of State (DOS), and the Central Intelligence Agency (CIA) to the Court for *in camera* review in accordance with (IAW) RCM 701(g)(2).

On 18 April 2012, the Defense moved the Court to find that the above damage assessments are in the possession, custody, and control of military authorities and discoverable as material to the preparation of the Defense IAW RCM 701(a)(2).

On 26 April 2012, the Government requested the Court reconsider its ruling with respect to the State Department damage assessment because the assessment is a draft and, therefore, not discoverable.

On 11 May 2012, the Court denied the Government's motion.

On 18 May 2012, the Government filed two classified *ex parte* motions with the Court to authorize redactions for the DIA IRTF final report and the CIA WikiLeaks Task Force report.

On 22 May 2012, the Defense moved the Court to order the Government to provide a non *ex parte* version of its motions and proceed under MRE 505(i).

On 29 May 2012, the Court granted the Defense motion in part.

On 1 June 2012 the Defense filed its Response to the Government Motions for authorization of a substitution and asked the Court to consider the following factors when conducting its 505(g)(2) *in camera* reviews:

- a) What is the extent of the redactions/substitutions?
- b) Has the Government narrowly tailored the substitutions to protect a Governmental interest that has been clearly and specifically articulated?
- c) Does the substitution provide the Defense with the ability to follow-up on leads that the original document would have provided?

- d) Do the substitutions accurately capture the information within the original document?
- e) Is the classified evidence necessary to rebut an element of the 22 charged offenses, bearing in mind the Government's very broad reading of many of these offenses?
- f) Does the summary strip away the Defense's ability to accurately portray the nature of the charged leaks?
- g) Do the substitutions prevent the Defense from fully examining witnesses?
- h) Do the substitutions prevent the Defense from exploring all viable avenues for impeachment?
- i) Does the Government intend to use any of the information from the damage assessments? If so, is this information limited to the summarized document provided by the Government? If the information intended to be used by the Government is not limited to the summarized document, does the Defense in fairness need to receive the classified portions of the documents to put the Government's evidence in proper context?
- j) Does the original classified evidence present a more compelling sentencing case than the proposed substitutions by the Government?
- k) Do the proposed substitutions prevent the Defense from learning names of potential witnesses?
- l) Do the substitutions make sense, such that the Defense will be able to understand the context?
- m) Is the original classified evidence necessary to help the Defense in formulating defense strategy and making important litigation decisions in the case?
- n) Is it unfair that the Government had access to the unclassified version of the damage assessment and the Defense did not? Does that provide a tactical advantage to the Government?

After considering the pleadings, evidence presented, and argument of counsel, and after conducting *in camera* review of the DIA IRTF final report and the CIA WikiLeaks task force report considering the factors requested by the Defense, the Court finds and concludes the following:

1. **DOS Damage Assessment:** On or about 18 April 2012, the Government produced the DOS draft damage assessment to the Court for *in camera* review and requested reconsideration of its 23 March 2012 order. On 11 May 2012, the Court denied the Government's request for reconsideration. On 18 May 2012, the Government advised the Court that the Government would produce the draft report without redaction to Defense Counsel and their security experts. As such, the Defense motion to compel the DOS damage assessment and to find it discoverable under RCM 701(a)(2) is moot.

2. **DIA Information Review Task Force (IRTF).** On 18 May 2012, the Government produced the IRTF final report to the Court for *in camera* review and a substituted final report with proposed redactions IAW MRE 505(g)(2). The Court conducted an *in camera* review of the original IRTF final report and the proposed substitution considering the factors requested by the Defense and finds:

a. Whether evaluating the substitutions under RCM 701(a)(6) or RCM 701(a)(2), the redacted substitution is sufficient for the Defense to adequately prepare for trial and represent an appropriate balance between the right of the Defense to discovery and the protection of specific

national security information. The redactions are minor and limited in scope. The Government is releasing the report almost in its entirety.

b. The redactions are not favorable to the accused; material to the preparation of the defense; or necessary to enable the accused to prepare for trial.

c. Each of the redactions constitutes specific classified information. Redaction is necessary to protect national security and particular sources and methods.

The Government will disclose the redacted DIA IRTF final report to the defense by COB today. The Defense Motion to Compel the DIA IRTF final report is moot.

3. **CIA.** The Government completed a review of the CIA WikiLeaks Task Force report for evidence favorable to the accused and material to guilt or punishment. The Government filed an *ex parte* motion for *in camera* review by the Court IAW MRE 505(g)(2) to determine whether a proposed Government substitution shall be disclosed to the Defense or whether disclosure of the classified information itself is necessary to enable the accused to prepare for trial. The Court has conducted an *in camera* review of the classified information considering the factors requested by the Defense. The Government substitute discloses *Brady* and RCM 701(a)(6) material but not material under RCM 701(a)(2). The Court does not find at this time that the proposed substitute is sufficient. The Court will meet *ex parte* with Government counsel in an area appropriate for review of classified information. A court reporter will transcribe the classified proceedings.

RULING: The Classified motions by the Government to voluntarily provide limited disclosure under MRE 505(g)(2) of the DIA IRTF final report is **GRANTED**. The Court finds the substitution as currently drafted is not sufficient under MRE 505(g)(2) and holds the decision in abeyance pending the *ex parte* proceeding with the Government and review of what the Government intends to introduce and not introduce in its sentencing case.



DENISE R. LIND

COL, JA

Chief Judge, 1st Judicial Circuit